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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 322

ALEXANDER T. SPERRY, *Petitioner*,

vs.

STATE OF FLORIDA, ex rel., THE FLORIDA BAR,
Respondent.

**On Petition For a Writ of Certiorari
To The Supreme Court of Florida**

BRIEF OF AMICUS CURIAE, ASSOCIATION OF INTERSTATE COMMERCE COMMISSION PRACTITIONERS, IN SUPPORT OF PETITION

JOHN R. TURNEY,
D. W. MARKHAM,
2001 Massachusetts Avenue, N.W.,
Washington 6, D. C.,
Attorneys for AMICUS CURIAE.

NUEL D. BELNAP,
One North LaSalle Street,
Chicago 2, Illinois,
Of Counsel.

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The Association of Interstate Commerce Commission Practitioners, appearing as *amicus curiae* with the consent of the parties, files this brief in support of the Petition for a Writ of Certiorari.

Interest of Amicus Curiae

The Association of Interstate Commerce Commission Practitioners is a voluntary association whose object, as stated in its Constitution, is, in part,

> "to promote the proper administration of the Interstate Commerce Act and related acts; [and] to uphold the honor of practice before the Interstate Commerce Commission."

Membership in the Association is open to any person who has been granted a certificate by the Interstate Commerce Commission to practice before it and to members of the regulatory bodies of the several states and the District of Columbia. Members of the Interstate Commerce Commission are honorary members of the Association. The present membership of the Association includes 3,957 persons who have been admitted to practice before the Commission.

The Interstate Commerce Commission, in the exercise of its statutory authority,[1] had adopted regulations[2] governing admission to practice before it, including a code of ethics and provisions for denial of admission, censure, suspension, or disbarment of practitioners. Like the United States Patent Office and certain other federal offices and agencies, the Interstate Commerce Commission admits to practice before it, not only attorneys-at-law, but other persons who are found to possess the necessary qualifications. As of June 30, 1961, 19,705 attorneys and 9,334 non-lawyers had been

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[1] 49 U.S.C. § 17(3); Goldsmith v. United States Board of Tax Appeals, 270 U.S. 117, 46 S. Ct. 215, 70 L. ed. 494 (1926).

[2] General Rules of Practice, §§ 1.7-1.13, Appendix A, 27 F.R. 7520-1, 7534-7.

admitted to practice before the Commission.[3] The membership of the Association includes non-lawyer practitioners residing in every state of the United States except three (Hawaii, Nevada and Vermont).

Since the question presented in this case involves the right of the states to interfere with, or prohibit, practice by non-lawyers before a federal office or agency to which they have been admitted to practice, the Association has a vital interest in the determination of the question, not only because of its effect upon the non-lawyer members of the Association, but also because of its effect upon the administration of the Interstate Commerce Act and related acts.

ARGUMENT

1. The Question Presented Is of Widespread Public Importance

The question presented for review has serious and far-reaching implications.

a. On its face, it involves a delicate problem of adjustment in federal-state relations. A state, in the exercise of its undoubted power to regulate the practice of law within its boundaries, has undertaken to prohibit, by injunction, activities which have been authorized by an agency of the United States in the exercise of its statutory power to regulate practice before it. Obviously, one or the other must give way, or a basis for accommodation must be found.

b. The problem, and its solution, concern, not just one state and one federal agency, but all of the states and several federal agencies. It is common knowledge that the American Bar Association and state bar asso-

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[3] SEVENTY-FIFTH ANNUAL REPORT, INTERSTATE COMMERCE COMMISSION (1961), p. 172.

ciations throughout the country have been active for years in an endeavor to control the unauthorized practice of law—and practice by non-lawyers before administrative agencies has been the object of repeated scrutiny.[4] While the states have adopted a variety of solutions with respect to practice before their own administrative agencies,[5] a number of federal agencies, in addition to the Patent Office, authorize non-lawyers, who meet their qualifications, to practice before them. As noted previously, the Interstate Commerce Commission has admitted over 9,000 non-lawyers to practice before it. In addition, both the United States Treasury Department[6] and the Tax Court of the United States[7] admit qualified non-lawyers to practice, but no statistics are published as to the numbers so admitted. Litigants before these agencies undoubtedly number in the thousands each year, and the personal and business interests affected by their rulings are unquestionably identified with every state in the nation.

c. The currency of the question is clearly evidenced by the fact that, in a period of less than three months in the Spring of 1962, appellate courts in three states decided cases involving the right of non-lawyers to practice before two federal agencies. In addition to the decision of the Supreme Court of Florida in the instant case (dated April 4, 1962) and the decision of the Ohio

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[4] See, for example, vom Bauer, *Administrative Agencies and Unauthorized Practice of Law*, 48 A.B.A.J. 715 (August, 1962); Robinson, *Appearances by Laymen in a Representative Capacity before Administrative Bodies*, 5 LAW & CONTEMP. PROB. 89 (1938).

[5] See, for example, *Comment*, 35 MICH. L.R. 442 (1937).

[6] 31 C.F.R. §§ 10.2 *et seq.*

[7] 26 C.F.R. § 701.2.

Court of Appeals in the *Battelle* case[8] (dated February 13, 1962), both of which involved practice before the Patent Office, the Supreme Court of Wisconsin, on May 1, 1962, handed down its decision in a case strikingly similar to the instant case, but involving a nonlawyer practitioner before the Interstate Commerce Commission.[9] Clearly, the question is one of current and widespread interest.

2. The Law On the Question Is In Doubt and Should Be Settled

a. The decisions of the state courts on the question here presented are highly divergent, both in rationale and result. The four reported cases involving practice before the Interstate Commerce Commission will serve to illustrate the conflicts.

(i) In the most recent,[10] the Attorney General of Wisconsin, on relation of the State Bar, brought a *quo warranto* proceeding against Keller, alleging that, although not a member of the Wisconsin bar, he was engaging in activities which constituted the practice of law. Keller answered that he was a licensed practitioner before the Interstate Commerce Commission and the Public Service Commission of Indiana; that he was authorized to practice before the Wisconsin Public Service Commission; and that many of the activities alleged in the complaint were incidental to his representation of clients in interstate-commerce matters. The State demurred to the answer, and, on respond-

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[8] Battelle Memorial Institute v. Green et al., 133 U.S.P.Q. 49, reprinted in Appendix C to Petition herein.

[9] State ex rel. State Bar of Wisconsin v. Keller, 114 N.W. 2d 796, discussed *infra*.

[10] State ex rel. State Bar of Wisconsin v. Keller, *supra*.

ent's motion for summary judgment, the circuit court dismissed for want of jurisdiction over the subject matter. On appeal, the State Supreme Court, after holding that the lower court had erred as to the scope of its jurisdiction, decided that, since there were no substantial issues of fact involved, it could properly dispose of the case on the merits. In so doing, it concluded that Keller had been engaged in unauthorized practice of law and directed that an injunction issue restraining him—

> "(a) from the giving of legal advice and instruction to clients to inform them of their rights and obligations;
>
> "(b) from the preparation for clients of documents requiring knowledge of legal principles not possessed by ordinary laymen; and
>
> "(c) from appearing as an advocate asserting legal rights for a client before public tribunals which possess power and authority to determine the rights of such clients according to law."[11]

In the course of its opinion, the Court said:[12]

> "* * * the Public Service Commission [of Wisconsin] may countenance appearances before it by laymen but it may not by any rule or otherwise empower any person not licensed to practice law to practice it, or to grant immunity to one who does.
>
> "We hold, further, that the alleged lawfulness of respondent to engage in similar activities in other jurisdictions, such as in the State of Indiana or before the Interstate Commerce Commission, is immaterial in the case at bar. * * * Foreign

[11] 114 N.W. 2d at pp. 802-3.

[12] *Id.*, at p. 801.

> bodies can no more authorize persons unlicensed in this state to practice law here than could the Public Service Commission of Wisconsin."

(ii) This decision contrasts sharply with that of the Supreme Court of Missouri in the *De Pass* case, discussed[13] and reprinted[14] in the Petition herein, where the Court held valid a contract under which the plaintiff, a non-lawyer practitioner before the Interstate Commerce Commission, had undertaken to represent the defendant in proceedings before that agency. The Court commented:[15]

> "Defendant seems to argue that the right to define the practice of law and to regulate persons engaging in such practice falls within the police power of the states. So it does, except in so far as that right does not run contra to an Act 'made in pursuance' to the Federal constitution.
>
> * * * * * * * * *
>
> The plaintiff's contract is valid under Federal law and that law is binding on the courts of this state."

(iii) In a third case,[16] the Ohio Court of Appeals held unlawful and void a contract under which the plaintiff had been employed to audit defendant's freight bills; to prepare, file, prosecute and adjust claims arising thereunder; and to take all necessary steps to effect reductions in the rates and classifications applicable to defendant's shipments. Plaintiff's activ-

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[13] At pp. 18-9.

[14] Appendix C, pp. 52-9.

[15] *Id.*, at pp. 56-7, 58.

[16] Public Service Traffic Bureau, Inc. v. Haworth Marble Co., 40 O. App. 255, 178 N.E. 703 (Ct. App. Ohio, 1931).

rties in performing the contract had included negotiations with, and the filing of a complaint with, the Interstate Commerce Commission. The Court apparently found no illegality in the services actually performed by plaintiff under the contract; on the contrary, it accepted plaintiff's contention that practice before an administrative body, as distinguished from a judicial body, does not constitute the practice of law, noting that practice before the Interstate Commerce Commission and certain other federal administrative agencies is not confined to attorneys. But it concluded that the contract contemplated the eventual prosecution of claims in courts of law, a service which plaintiff corporation could not lawfully perform,[17] and that the contract was, therefore, unenforceable.

(iv) The fourth case[18] was an action to enjoin two corporations and certain individuals from continuing activities alleged to constitute unauthorized practice of law. One of the corporations undertook to provide a complete service to motor carriers in connection with regulatory matters before both the State commission and the Interstate Commerce Commission. Matters before the latter agency were handled, for the corporation's customers, by a full-time employee of the corporation who was a registered, non-lawyer practitioner before that agency. The Court held that it could not enjoin the individual from continuing to practice before the Interstate Commerce Commission, stating,[19]

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[17] The rules of practice of the Interstate Commerce Commission do not permit corporations to practice before it in a representative capacity 27 F.R. 7520, § 1.7.

[18] Blair et al. v. Motor Carriers Service Bureau, Inc., et al., 40 Pa. D. & C. 413 (Phila. County, 1939).

[19] *Id.* at p. 426.

> "A proper regard for the prerogatives of an important Federal administrative tribunal should prevent the issuance of an injunction restraining one from doing precisely that which such a tribunal has seen fit to authorize him to do."

But it did enjoin the corporation from holding itself out to provide such services or from engaging individuals to represent its customers before such agencies.

These four cases, particularly when considered in conjunction with the decision of the Florida Supreme Court in the instant case, illustrate the sharp conflicts, in reasoning and results, to be found in the decisions of the state courts on the question here presented.

b. Since the question is, by its very nature, one which affects an important and delicate area of federal-state relations, it can be answered, in the last analysis, only by this Court. Continued uncertainty as to the law on the question can only result in continuing, and probably growing, tensions in this sensitive area, and in further litigation. And a review of the cases discussed and cited in the Petition and above is enough to dash any hope that further litigation will, in the absence of a guiding decision by this Court, produce the needed consistency and certainty in the law on the question.

3. This Case Is An Ideal Vehicle For Determination of the Law On the Question

Few, if any, of the cases which have arisen in the past present the federal question as sharply and cleanly as does the instant case. Here, the question is not obscured or complicated by problems of corporation practice or solicitation, interpretation of contracts, or other problems of state law, which might, in the future, confuse analysis and understanding of the Court's de-

cision. As a result, the case provides an unusual opportunity to meet the question squarely and to settle the law on it.

4. The Decision Below Is In Apparent Conflict With Constitutional Principles

At this stage in our history, it would seem axiomatic that a state may not interfere with, much less prohibit, a valid exercise of federal powers. Certainly, a direct interference with the lawful operations of a federal officer or agency runs afoul of the Supremacy Clause of the Constitution.[20] But one short step removed—and still within the constitutional ban—is an interference with, or prohibition of, acts by a citizen which have been lawfully authorized by a federal officer or agency.[21] And the step is a shorter one when the citizen may be said to be an "officer" of that agency (in the same sense that an attorney is an officer of a court before which he has been admitted to practice).

Here, the Supreme Court of Florida, without questioning the power of the United States Commissioner of Patents to regulate practice before the Patent Office or the validity of the regulations adopted by him for that purpose, has undertaken to enjoin petitioner from engaging, in the State of Florida, in activities which

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[20] Art. VI, cl. 2. Mayo v. U.S., 319 U.S. 441, 63 S. Ct. 1137, 87 L. ed. 1504 (1943), *rehearing denied*, 320 U.S. 810, 64 S. Ct. 27, 88 L. ed. 489 (1943); Johnson v. Maryland, 254 U.S. 51, 41 S. Ct. 16, 65 L. ed. 126 (1920); Easton v. Iowa, 188 U.S. 220, 23 S. Ct. 288, 47 L. ed. 452 (1903); Ohio v. Thomas, 173 U.S. 276, 19 S. Ct. 453, 43 L. ed. 699 (1899); Tennessee v. Davis, 100 U.S. 257, 25 L. ed. 648 (1880).

[21] Miller v. Arkansas, 352 U.S. 187, 77 S. Ct. 257, 1 L. ed. 2d 231 (1956).

he is authorized to perform, as a registered practitioner before the Patent Office, by the regulations of the Commissioner. That such a prohibition would not only curtail the activities of petitioner and other non-lawyer practitioners in Florida, but would impede the operations of the Patent Office itself, particularly if extended to non-lawyer practitioners in other states, can hardly be questioned. On its face, therefore, the decision below appears to assert the supremacy of state over federal authority, in contravention of the Supremacy Clause of the Constitution.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari herein should be granted.

Respectfully submitted,

JOHN R. TURNEY,
D. W. MARKHAM,
Attorneys for AMICUS CURIAE

NUEL D. BELNAP,
Of Counsel.

Dated: September 5, 1962

CERTIFICATE OF SERVICE

I, D .W. Markham, one of the attorneys for the Association of Interstate Commerce Commission Practitioners, *amicus curiae* herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 5th day of September, 1962, I served copies of the foregoing brief on the petitioner and respondent herein by mailing copies, in duly addressed envelopes, with airmail postage prepaid, to their respective attorneys, as follows:

To Oscar A. Mellin, Esq.,
111 Sutter Street,
San Francisco 4, California,
attorney for petitioner; and

To Sherwood Spencer, Esq.,
Hollywood Federal Building,
Hollywood, Florida,
attorney for respondent.

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2001 Massachusetts Avenue, N.W.,
Washington 6, D. C.,
Attorney for AMICUS CURIAE.

September 5, 1962.